FILE COPY.

Office Supreme Court U. S.
FILED
DEC 6 1904
JAMES H. McKENNEY,
Clerk.

ARGUMENT AND BRIEF OF DEFENDANT IN ERROR

Supreme Court of the United States

OCTOBER TERM, A. D. 1904

Term No. 98.

C. P. COOK AND ED. PLUNKETT, PLAINTIFFS IN ERROR

vs.

THE COUNTY OF MARSHALL, STATE OF IOWA

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

F. E. NORTHUP, Attorney for Defendant in Error

(19,036)

(19,036)

Supreme Court of the United States

OCTOBER TERM, A. D. 1904

Term No. 385

C. P. COOK AND ED. PLUNKETT, PLAINTIFFS IN ERROR

vs.

THE COUNTY OF MARSHALL, STATE OF IOWA

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

Argument and Brief of Defendant in Error

F. E. NORTHUP, Attorney for Defendant in Error

STATEMENT OE ERRORS COMPLAINED OF.

The jurisdiction of this court is invoked by plaintiffs in error on the grounds:

One. That they have certain rights granted under the constitution of the United States which have been violated in the enforcement of the provisions of Section 5007 of the Code of Iowa, the section in question being as follows:

"There shall be assessed a tax of $300 per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled

with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away under any pretext whatever.

"Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing interstate business with customers outside the state." Section 5007, Code of Iowa.

Two. It is claimed that the said act is in contravention of Section 8 Article 1 of the Constitution of the United States presumably under the claim that it is an attempt "to regulate the commerce among the several states," and it is further in conflict with Section 10 Article 1 of the Constitution of the United States in that such a law is "an exercise of the taxing power which is subject to the exclusive control of Congress."

Three. The claim is further made that said Section 5007 of the Code of Iowa under which a certain assessment and tax was levied against the property of plaintiffs in error was in violation of the Fourteenth Amendment of the Constitution of the United States in that "it denies to said plaintiffs in error the equal protection of the laws, they being residents within the jurisdiction of the State of Iowa." The statement of the case in question is well and conscientiously made in the opinion of Justice Weaver of the Supreme Court of the State of Iowa, as appearing in the transcript of record heretofore filed.

It will be observed that the legislature in framing the law in question did not intend the same to usurp any of the functions of congress and by the very language of the act itself expressly exempted transactions of interstate commerce with customers outside of the state. The language in this respect of the act in question being "but the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing interstate business with customers outside of the state." Section 5007, Code of Iowa.

We do not apprehend that it will be seriously contended that the said act as applied to transactions and sales of cigarettes within the state not affesting interstate commerce, is unconstitutional. Plaintiffs in error claim the protection of the interstate commerce law, without making claim of coming within the exception as contained in the provisions of said act, and while not denying their traffic in cigarettes within the state of Iowa and while not claiming that the goods were in any manner affected while in transit do claim that they were only selling and handling said goods in the original package as received from the manufacturer in another state and that therefore they were exempt from taxation. The whole contention in this case we believe is strictly at issue upon the question OF THE GOOD FAITH OF THE TRANSACTION. As bearing upon that feature it is competent to observe the "original package" which is the subject of controversy. In this case it is disclosed, that it is not claimed that the package in question, consisting of a small cigarette box containing 10 cigarettes was shipped independently and by itself and was packed, labeled or consigned in any manner as a commercial production. The best that can be said of it being that we do not know how it came from the hands of the manufacturer into the

hands of the dealer, it being urged that "neither the American Tobacco Company nor any of its employees fnrnished any box, bale, bag, wrapping or any covering for these packages nor in any way attached them together." They were delivered by the express company and did not bear any mark or address upon them, it being conceded however that they traveled collectively and were held together and kept in mass by the watchful eye of the express company alone as they were in transit, it being contended that by the absence of such wrapping or placing in a box or receptacle that they therefor each retained their identity as original packages. By the application of sound reason and common sense to the transaction it was plainly an effort to render the provisions of the statute a nullity and is a clear and palpable attempt to evade the law. It cannot be urged that it is an "original package" such as was contemplated by the courts in using the term in question, as they, undoubtedly contemplated that the package would be of sufficient dimension to be likely to be broken up and distributed to the retail trade by the dealer.

It seems to have been in contemplation of the mind of the courts who have followed the long line of "original package" decisions hereinafter referred to that it was such a bale, package, cask or collection as would be likely to assume proportions with an idea of convenience in shipment and safety in transit and bearing through all the stages of its transition from the manufacturer to dealer a separate and distinct identity.

In the case of *Austin vs. Tenn., 179 U. S., 343*, the court had occasion to refer to the case of Brown vs. Maryland, the opinion by Chief Justice Marshall, and quoting the language of that case say, "whether the decision would have been the same if the original package in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquor, had been so

minute in size as to permit their sale directly to consumers may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume it did not occur to the chief justice that by skillful alteration af the size of the packages the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states." Again in none of the decisions so far as we have been able to ascertain aside from the Austin case above, was the question ever presented to the Supreme Court of the United States claiming that so infinitesimal a package as a box of cigarettes could deserve the distinction of being an "original package." It is a well known maxim of law "that the law does not concern itself with trifles." We do not believe that the court will go far in hair-splitting deductions, to sanction a commerce said to be limited to the transportation of a single package of ten cigarettes.

In the case of Leisy vs. Hardin, 135 U. S., 100, no question was made with regard to the casks being "original packages" or as to the fact that according to the custom of brewers beer was usually and ordinarily imported from one state to another in casks of this size. In that case the quantities seized by the city marshal of Keokuk under a state statute prohibiting the sale of intoxicating liquors was *122 quarter barrels of beer; 171 1-8 barrels and 11 cases.* It was justly held that "being articles of lawful commerce the state could not in the absence of legislation on the part of congress prohibit their importation from abroad or from a sister state, or when imported prohibit their sale by the importer, or that they did not become a part of the common revenue property within the state so long as they

remained in the casks in which they were imported and continued to be the property of the importer."

In *Schollenberger vs. Pennsylvania., 171 U. S. I.*, the packages sold *were of 10 pound weight* and in that case oleomargarine was recognized as a lawful article of commerce and when it could not be wholly excluded from importation into a state from another state, where it was manufactured, and so long as it remained in its original package, could be sold notwithstanding a statute of the state prohibited such sale. We doubt very much if in the case of *Leisy vs. Hardin* the liquor had been imported in half pint bottles and shipped collectively to be sold and distributed by the retailer that the court would have considered each one an "original package," especially if it had been made to appear that they were so bottled and shipped for the exbress purpose of evading the law. Indeed the decision which originally recognized the "original package" and which has been the foundation of all subsequent decisions along that line, *was made with reference to foreign commerce only* and were employed in discussing the constitutional prohibition of duties and imposts by state authorities, and did not involve any consideration of interstate commerce.

Cites—*Woodruff vs. Parkam, 8 Wall., 123.*

The majority opinion in the case of *Austin vs. Tenn., supra*, noted the distinction.

The term "original package" relates wholly to goods prepared for transportation and is generally said to be a parcel, bundle, bale, box or case made up of or "packed" with some commodity with a view to its safety and convenience in handling in transportation.

Keith vs. State, 91 Ala., 2.

State vs. Board, 46 La., 146,

Austin vs. State, 101 Tenn., 563.

While it has been recognized in the case of *McGregor vs. Cone, 104 Ia., 465*, that such "original

package" need not be securely boxed or encased but it has reference "to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import and when he delivers it to the carrier for transportation he gives it the initial step and from that time until sold in that form or broken, and transformed, it is the subject of interstate commerce. But when sold or broken or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. * * * If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone becomes a part of the common mass of property within the state and it is subject to the laws of that state enacted by virtue of its police power."

In that case the "original package" the unit of commerce was broken, the contents exposed to sale and by such sale it lost its distinctive character as an import. In the case at bar, assuming that the packages of cigarettes were delivered in bulk we cannot see any reason for the rule which would determine that a box containing packages of cigarettes thrown in loosely would be different from a consignment of cigarette boxes shipped loosely and handled as a mass, even though in the language of Justice Weaver of the Supreme Court of Iowa, "that they were handled by carrying the boxes as ants carry sand, one grain at a time." It is aptly stated, in his opinion, in the case at bar that "we may rightfully assume that the express company in receiving and shipping these little boxes did it in a rational manner by gathering them, if not in baskets in receptacles of some suitable and convynient kind."

We think the loss of one cigarette box would have changed the identity of the shipment and that in fact

the identity as an "original package" applied to the entire mass of cigarette boxes taken as a whole and not each individual element thereof. If a package of commeace is capable of being declared an "original package" without reference to its convencience or safety in handling or its importance then as well could it apply to a single cigarette as to the small box of 10 cigarettes. The rule heretofore announced with reference to the "original package" as in the case of Leisy vs. Hardin, 135 U. S., 100, had application to the original and unbroken and unopened package. But in the case at bar the defendants in error contended that the package was broken and open from the time of consignment until its receipt by the retailer and afterwards in his possession at the time the tax was imposed. That so far from being an "original package" in this instance it is our contention that it never possessed the incidents and attributes of an "original package."

We believe for other good reasons well defined in the law the act in question could not be held unconstitutional. Every presumption and intendment in which the court can reasonably indulge should be considered before declaring any act invalid. Especially is this true when it is enacted as a police regulation and its operation is for the protection of the morals and health of the inhabitants of a state. It must be a clear usurpation of prohibited power. While it will be contended that there may be certain cases of such public importance involving a principle of such general application that it would be hardly proper to consider the spirit and intendment of the constitution, gathered by implication, yet such reason and authority is not to be invoked in aid of an enterprise obnoxious to justice and good government. The statute canuot be unconstitutional solely because of an unjust or oppressive provision or because it is supposed to violate some

right unless it be shown that such injustice or oppression is prohibited or such rights guaranteed or protected by the constitution.

Objections to the policy of a legislative enactment have no place in the consideration of this case so long as it is free from objection on constitutional grounds.

"The exercise of legislative powers may be justified on the ground of police power, which would otherwise be unconstitutional, when they are such only, as are requisite for the safety, comfort or necessities of the public, and when they are such as the framers of the constitution as men of ordinary prudence could not be supposed to have intended to prohibit, despite the language of Prohibition."

People vs. Jackson Co., 9 Mich., 285.

New Orleans Gas Light Co. vs. Louisiana Light & Heat Co., 115 U. S., 650.

Black on Constitutional Prohibition Sec. 62.

It is conceded that a state can, for the purpose of protecting its people against the evils of intemperance enact laws which regulate commerce between its people but not with those of other states of the Union unless with the consent of congress either express or implied first obtained.

Bowman vs. Railroad Co., 125 U. S., 465.

It seems to haye been questioned in the same case as to whether the right of protection of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where transportation terminates, but, in Leisy vs. Hardin. 135 U. S., 100, the court went even farther in holding that a sale by the importer in the "original package" or case unbroken or unopened could not be regulated by legislative enactment and that an attempt to do so was unconstitutional and void.

In the cases cited there was no question but what the shipments *were in the ordinary course of business and were made in good faith and were in such packages as were ordinarilly* used in commercial transactions. It will not be contended by the defendants in this case that tobacco, even in the form of cigarettes, is not a legitimate article of commerce, in the same class with intoxicating liquors and subject to the police regulations of the state. It is certainly within the provisions of the legislature to declare how far tobacco in the form of cigarettes may be sold, and even their sale may be prohibited entirely after they have been taken from the "original package" or have left the hands of the importer provided no discrimination be used as against those imported from other states and there being no question but what the act was designed for the protection of the public health.

Austin vs. Tenn., *Supra.*

Original packages were defined in the same case to be such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it is sent it will not be protected as an original package against the police laws of the state. *id.*

Where cigaretts are impoted in paper packages 3 inches in length and 1½ in width containing 10 cigarettes, (as in this case), unboxed or thrown in loosely into boxes; *held* that such paper parcels were not "original packages" within the meaning of the law and that such importations were evidently made for the purpose of evading the law of the state prohibiting the sale of cigarettes.

Austin vs. Tenn., *Supra.*

We urge that the decision in this case should turn precisely upon the matter in issue in the case of Austin

vs. Tenn., above referred to where it was held that the sales shown to have been made were not the sale of the "original package" in the true or commercial sense. The rule was there recognized that police regulations might be passed and be valid in restricting and preventing the sale of articles deletarious to public health or for the public safety or public morals even to the extent of requiring the discontiuuance of the manufacturing or traffic and even though a corporation might thereby suffer inconvenience and loss of property-rights.

Citing—Bartmeyer vs. Ia., 18 Wall., 129.

Beer Co. vs. Mass., 97 U. S., 25.

Muggler vs. Kas., 125 U. S., 623.

Such an act has been held not to be repugnant to the Constitution of the United States, in Foster vs. Kas., 112 U. S., 201.

In Powell vs. Penn., 127 U. S., 678, such a law was held with respect to the manufacture or sale of olemargarine to be a lawful exercise by the state of its power to protect by police regulation the public health and that it neither denied to persons within the jurisdiction of the state the equal protection of the law nor deprived them of their property without compensation and was not otherwise repugnant to the Fourteenth Amendment. The like rule was announced in Plumber vs. Mass., 155 U. S., 161, wherein the statute prohibited the sale of colored oleomargarine so as to look like yellow butter.

Wherever the enactment was a bona fida exercise of the police power dictated by concientious regard for the public health or safety in prohibiting the sale of obnoxious products such legislation has been respected though it might interfere directly with interstate commerce. In the legislature alone is necessarily vested the discretion to determine not only what legislation should be resorted to for the purpose of preserving the

public health, safety or morals or of the abating of public nuisance and the means necessary for the protection of such interests.

In the case of Brown vs. Maryland, 12 Wheaton, 419, it was conceded that so long as the packages remained in their original case they were not subject to taxation but this immediately ceased as soon as the boxes were opened. The same rule was followed in the case of May vs. New Orleans, 178 U. S., 496, where a mode of putting up a package is not adapted to meet the requirements of the state of commerce but the requirements of an unlawful retail trade the dealer will not be protected on the ground that he is selling a thing in an "original package."

In the case of Commonwealth vs. Fisherman, 128 U. S., 687, *held* that the defendant engaged in the sale of liquors at retail in pint bottles enclosed within pasteboard boxes which were shipped in barrels, was engaged in selling at retail and it is claimed he was selling "original packages" was little better than a burlesque.

"It is an established principal that the only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce; such as * * * the passage of inspection laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the *imposition of taxes* upon persons residing in the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitu-

tion and laws of the United States and the imposition of taxes upon all property within the state, mingling with and forming part of the great mass of property therein."

Robbins vs. Shelby Taxing Dist., 120 U. S., 489.

And even apart from the measures to protect health, the State may prescribe rules for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for reusing to obey the directions of such officers; *and it may impose a tax* upon vessels sufficient for the expenses attendant upon the executions of these regulations.

Vanderbilt vs. Adams, 7 Cow., (N. Y.), 349.

In a leading case on this point Wilson vs. Black Bird, etc. Co., 2 Pet. (U. S.), 245, in which a State law authorizing the erection of a dam across a small navigable creek in order to exclude the tide and reclaim an unhealthy marsh, it was said * * * "if the fact that interstate commerce may be incidentally affected to an infinitesimal degree were held to prevent a State from exercising the most ordinary and necessary functions of government in a matter in which congress has shown no intention of acting, or from allowing its citizens to protect their own health or promote their own convenience, local self goverment would be at an end."

As was said in Sherlock vs. Alling, 93 U. S., 99: "Whatever congress determines, either as to a regulation (of commerce) or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights

and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of congress are silent, and the laws of the State govern * * * and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

The power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce.

Gloucester Ferry Co. vs. Penna., 114 U. S., 196.

Hence, the importation of diseased cattle from another State may be prohibited.

M. P. R. Co. vs. Finley, 38 Kan., 550.

And the importer may be held liable for the consequences of letting cattle which come from a dangerous district run at large.

Kimmish vs. Ball, 129 U. S., 217.

But all importaions of cattle, whether diseased or not, from other States, or certain of them, cannot be forbidden.

R. R. Co. vs. Husen, 95 U. S., 455.

Salzenstein vs. Mavis, 91 Ill., 391.

Arton vs. Sherlock, 75 Mo., 247.

A State law punishiug the sale of oleomargine colored with annotto is valid as applied to a sale by the agent of a manufacturer in another State and although the package sold had been sent from such other State for sale. Waterbury vs. Newton, 50 N. J. L., 534. The court said: "It seems proper to conclude that the package of oleomargarine with which we are now dealing became, on its delivery to the consignee in Jersey

City, subject to our laws relating generally to all articles of that nature in the State, unless those laws are opposed to the legislation of congress. Tne only federal law (on the subject) implies that the prohibition of such traffic (in oleomargarine) by State legislation is permissible."

In McGregor vs. Cohn, 104 Ia., 465, heretofore cited, it was *held* that the defendant was liable notwithstanding the internal revenue department had for the purpose of taxes declared the small packages sold by the defendant to be the "original package" and for that purpose they were separately taxed by the government.

The matters in issue in this case have been before the court in every variety of form which the ingenuity of the dealer could suggest. The rule which was founded for the protection of legitimate commercial interests has been deliberately assailed by law breakers in their attempts to thwart the legislative enactments adopted for the general good. Until the plaintiffs in error can show that they are conducting a legitimate business entitled to the protection of the law as a commercial transaction can they be heard to question the integrity of the courts in upholding the police regulations of the various states.

We believe that the holding of the supreme court of Iowa in denying relief to the plaintiff in error was justified, not only in applying every available and legitimate remedy for the evil attempted under the guise of interstate commerce, but had ample reason in the law for such decision.

Believing that plantiffs in error have no cause of complaint upon any constitutional question, we respectfully submit the cause.

F. E. NORTHUP,

Attorney for Defendants in Error.

Notice is here given that the attorney for defendant will make oral argument on the final submission hereof in reply to the oral argument by counsl for plaintiff in error.